SUPREME COURT OF THE UNITED STATES.

No. 170.

ELIHU EVANS, PLAINTIFF IN ERROR,

vs.

JAMES PATTERSON.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF PENNSYLVANIA.

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1 Among the rolls, records, and judicial proceedings of the circuit court of the United States for the western district of Pennsylvania, in the third circuit, at Pittsburgh, may be found the following words and figures, viz:

No. 71 of May term, 1862.

JAMES PATTERSON, A CITIZEN OF THE STATE OF OHIO,
vs.
ELIHU EVANS, A CITIZEN OF THE STATE OF PENNSYLV'A, Andrew Hoge, John Hoge, and Andrew Hoge, jr., all citizens of the State of Pennsylv'a. } Summons in ejectment.

Be it remembered, that heretofore, to wit, on the 23d day of April, 1862, comes the plaintiff, by his attorneys, N. P. & G. S. B. Fitterman, and files the following precipe, viz:

JAMES PATTERSON, A CITIZEN OF THE STATE OF OHIO,
vs.
ELIHU EVANS, AND'W HOGE, JOHN HOGE, AND AND'W Hoge, jun'r, citizens of the State of Pennsylvania.

Issue summons in ejectment for a tract of land situate in Patterson Township, Beaver County, Pennsylvania, containing one hundred and fifty acres or thereabouts, bounded on the east by Big Beaver Creek, and on the
2 north by other land of the plaintiff, on the west by lands of the heirs of John Carothers, deceased, the heirs of John B. Webster, deceased, and other lands of the plaintiff, and on the south by lands of the heirs of the said John Carothers, deceased, and the Fallston Water Company, the right of possession to which the plaintiff says is in him, and not in the defendants. Returnable to the second Monday of May next.

April 23d, 1862.

N. P. & G. S. B. FELLERMAN,
Attorneys for Plaintiff.

To H. SPROUL, Esq., *Clerk.*

Whereupon the following summons was issued and delivered to the marshal:

3 UNITED STATES, *Western District of Pennsylvania, sct:*

The President of the United States to the marshal of the western district of Pennsylvania, greeting:

We command you that you summon Elihu Evans, Andrew Hoge, John Hoge, and Andrew Hoge, jr., citizens of the State of Pennsylvania, late of your district, if they may be found therein, so that they be and appear before the judges of the circuit court of the United States in and for the western district of Pennsylvania, in the third circuit, at a session of the same court, to be holden at Pittsburgh on the 2d Monday of May next, to answer to James Patterson, a citizen of the State of Ohio, in an action of ejectment for a tract of land situate in Patterson Township, Beaver County, Pennsylvania, containing one hundred and fifty acres, or thereabouts, bounded on the east by Big Beaver Creek, on the north by land of plaintiff, on the west by lands of the heirs of John Carothers, deceased, the heirs of John B. Webster, deceased, and other lands of the plaintiff, and on the south by lands of the heirs of said John Carothers, deceased, and the Fallston Water Company, the right of possession to which the plaintiff says is in him, and not in the defendants.

And have you then and there this writ.

Witness the Honorable Roger B. Taney, esquire, chief justice of the Supreme Court of the United States, at Pittsburgh, this 23d day of April, A. D. 1862, and in the 86th year of the independence of the said United States.

H. SPROUL, *Clerk.*

4 *Marshal's return up this writ.*

Served the within writ personally on the defendants, Elihu Evans, Andrew Hoge, John Hoge, and Andrew Hoge, jr., by giving to each of them severally a true copy hereof and making the contents fully known to them respectively.

April 29th, 1862.

So answers

A. MURDOCH,
U. S. Marshal, per Dep't.

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	9 56

Also, upon the 23d day of April aforesaid, the following affidavit was filed:

Copy of affidavit.

STATE OF PENNSYLVANIA, *Allegheny County, ss:*

Before me, clerk of the circuit court of the United States for the western district of Pennsylvania, personally appeared James Patterson, the pl'ff in the above recited ejectment, who, being duly sworn according to law, upon his oath, saith that Elihu Evans, one of the def'ts in said ejectment, by himself, his agents and employees, is committing waste on the land mentioned and described in the above ejectment by cutting down, carrying away, and destroying the timber trees on said land growing. And further saith not.

JAMES PATTERSON.

Sworn and subscribed to before me this 23 April, 1862.

H. SPROUL, *U. S. Com'r.*

Whereupon the following writ of ejectment was issued:

5 UNITED STATES OF AMERICA,
Western District of Penn'a, ss:

The President of the United States to the marshal of the western district of Pennsylvania, greeting:

Whereas, by the letting of the land no waste or strip ought to be committed on any lands or tenements by any tenant or defendant in any action while the same is depending in our courts undetermined; and whereas a certain action of ejectment was lately commenced in our circuit court of the the United States for the western district of Pennsylvania, in the third circuit, before our judges, in the city of Pittsburgh, in said district, by James Patterson, a citizen of the State of Ohio, against Elihu Evans, Andrew Hoge, John Hoge, and Andrew Hoge, jr., for a tract of land containing one hundred and fifty acres or thereabouts, adjoining the lands of John Carothers's heirs on the west, by Big Beaver Creek on the east, and on the north by other lands of pl'ff, and the south by lands of John Carothers's heirs and the Fallston Water Company, the right of possession and title to which the said James Patterson, plaintiff, saith is in him and not in the said defendants, which said action still remains before our judges undetermined, yet the said defendants, ten-

ants in possession of said premises, and the servants of the said defendants and others employed by them, very great waste and strip in the said lands and the wood standing and joining them, daily do commit, and do not desist pending the cause aforesaid, to the grievous hurt and damage of said plaintiff, contrary to the law of the land and divers statutes in such case made and provided:

6 We, therefore, being willing that the laws and statutes aforesaid be inviolably observed, do command you, the said marshal, that you strictly prohibit the said defendants and the said tenants and others employed by them from committing or doing any waste or strip to the lands or wood aforesaid contrary to the laws and statutes aforesaid, the cause aforesaid pending and undetermined.

And we do command you, the said defendants, that you do not cause to be done any waste or strip on the lands or wood aforesaid, as you shall answer the contrary at your peril and their peril by whom you shall cause waste or strip to be done pending the suit aforesaid.

Witness the Honorable Roger B. Taney, esq., chief justice of the Supreme Court of the United States.

Pittsburgh, the 23d day of April, 1862.

H. SPROUL, *Clerk.*

Endorsement upon this writ.

Served the within writ personally on Elihu Evans, John Hoge, Andrew Hoge, sr., Joseph M. Kenzie, Priestly McKenzie, and Andrew Hoge, jr., by reading the same to each of them severally and making the contents known to them respectively, April 29th, 1862.

So answers

A. MURDOCH,
U. S. Marshal, per Deputy.

M..... 12 00
1 56

13 56

7 In the circuit court court of the U. States for western dist., Pa.

And afterwards, to wit, August 18th, comes the pl'ff, by their attorneys, and files the following precipe:

JAMES PATTERSON *vs.* ELIHU EVANS *et al.* } Ejectment.

To Sproul, esq., clerk:

Issue rule to plead in one month, or judgment.

N. P. FETTERMON, *Att'y for Pl'ff.*

August 18, 1862.

Whereupon the following rule was issued and served:

In the circuit court of the United States for the western district of Pennsylvania.

JAMES PATTERSON *vs.* ELIHU EVANS *et al.* } No. 71 of May term, 1862.

And now, to wit, August 18th, 1862, rule to plead in one month, or judgment.

From the record.

H. SPROUL, *Clerk.*

Copy of pleas.

And afterwards, to wit, on the 22d day of September, 1862, the defendants, by their attorneys, Messrs. Chamberlain & Purviance, come and file the following pleas:

JAMES PATTERSON, A CITIZEN OF THE STATE OF OHIO,
vs.
ELIHU EVANS, ANDREW HOGE, JOHN HOGE, AND And'w Hoge, citizens of the State of Pennsylvania. } Ejectment.—No. 71, May term, 1862.

And now, to wit, the 22d September, 1862, def'ts plead not guilty *et de hoc*, &c., &c., with leave to add or alter at bar.

Def'ts, for further plea, say that pl'ff ought not to have and maintain his suit against them, because, they say, that two verdicts and judgments have been had against the said pl'ff and the parties from whom he derives title in the common pleas of Brown Co. and the United States circuit courts.

CHAMBERLAIN & PURVIANCE,
Attorneys for Defendants.

22d Sept., 1862.

9 And now, to wit, November 11th, 1863, the parties in this case being at issue, a jury being called, come, viz: Abraham Watring, Andrew Stewart, Geo. V. Lawrence, T. R. Hazard, Thomas Dowington, E. W. De Wolfe, Wm. L. Duart, Albert M. Retchie, N. Buckmaster, S. Beatty, jr., Joseph Henderson, and John White, twelve good and lawful men, who, having been duly summoned, returned, ballotted for, empannelled and sworn, do say they for the pl'ff with security, damages and costs.

And now, November 18th, 1863, judgment upon the verdict.

10 *Copy of bill of exceptions.*

Circuit court of the United States in and for the western district of Pennsylvania.

JAMES PATTERSON, A CITIZEN OF THE STATE of Ohio,
vs.
ELIHU EVANS, A CITIZEN OF THE STATE OF Pennsylvania. } Ejectment.—Case No. 71, of May term, 1862.

This was a suit instituted in ejectment for the following described tract of land, situate in the township of Patterson, county of Beaver, Pennsylvania, bounded and described as follows: On the east by Big Beaver Creek; on the north by other land of the plaintiff, and on the west by lands of the heirs of John Carothers, deceased, and the heirs of John B. Webster, deceased, and other lands of the plaintiffs; on the south by lands of the heirs of said John Carothers, dec'd, and the Fellston Water Company, containing one hundred and fifty acres or thereabouts.

The case at time come on for trial before the said circuit court, Justices Grier and McCandless presiding. Messrs. Wood & Fetterman appearing for plaintiff, and Messrs. Purviance & Chamberlain for defendant.

11 The plaintiff introduced in evidence a warrant from the commonwealth of Pennsylvania, dated 3d April, 1792, for 400 acres of land north and west of the rivers Ohio and Allegheny and creek; on the west of Big Beaver Creek, and to include the Wolmet Bottom, lying on the run that falls into said creek, nearly opposite an island between the Big and Little Falls, by estimation one mile above the Clark House, to Joseph Williams.

Also, a warrant dated 3d April, 1792, for 400 acres of land situate northwest of the river Ohio, on the west bank of Big Beaver Creek, between the Big and Little Falls, adjoining land granted to Joseph Williams.

—— to William Barker.

Also, survey of Jonathan Leet, dated 3d April, 1794, of Joseph Williams's warrant, dated April 3d, 1792, for 400 acres, bounded on the north by John Hill; east by Beaver Creek; south by ; west by Jonathan Hill, containing 400 acres and allowance.

Also, survey of Jonathan Leet, dated 4th April, 1794, of William Barker's warrant, dated 3 I April, 1792, for 440 acres, bounded north by Joseph Williams; east by Beaver Creek; south by Daniel Hill; and west by James Briant's claim, containing 440 acres and allowance, commencing at a black oak on the creek running west 244 p. to a maple, &c.

12 Also, deed poll of William Barker, dated 12th April, 1792, to Daniel Broadhead, reciting "have granted, bargained, sold and released unto the said Daniel Broadhead and his heirs, executors, administrators, and assigns, all right, title, interest, property, claim, and demand of, in, and to a certain warrant for land situate on the west bank of Big Beaver Creek, in the late purchase granted in my name, for 400 hundred acres, by warrant dated 3d April, 1792, and all lands surveyed thereon or thereby, subject to the purchase-money and interest thereon due, or to become due, to the commonwealth aforesaid, to hold the same to the said Daniel Broadhead, his heirs and assigns, forever, &c. Witnessed by James Burns.

Agreement of Daniel Broadhead and David Hoops, dated 18th August, 1801, being a contract to sell the tracts of land of the Joseph Williams and William Barker warrants, for $3,200, payable one half on delivery of deed, and the balance in two equal payments thereafter, with interest, and deed good and sufficient in fee to be made on or before 1st May following, and $100 paid down, and Hoops to enter into immediate possession.

Judgment record of Beaver County, common pleas, Peter Miller *vs.* Hoops, Townsend & Co, (David Hoops one of defendants,) No. 39, Feb. 4, 1805, and lands levied upon and sold, as sheriff's deed by Jonathan Coulter, sheriff of Beaver County, to Isaac Wilson, of 80 acres of land, more or less, and about 11 acres cleared and fenced in.

13 Also, the warrant claim of 800 acres of land on the west side of Big Beaver Creek, adjoining the Middle Falls. Deed dated October 4th, 1808.

Deed of Isaac Wilson and wife to Jeremiah Barker and Isaac Gregg, for one half of land, dated 25th April, 1812, as tenant in common; also deed of Isaac Wilson, dated 25th August, April, 1812, conveying other moiety of said lands to Jeremiah Barker and Isaac Gregg.

Record of an amicable action between Samuel Carswell, plaintiff, and Isaac Wilson, Jeremiah Barker, and Isaac Gregg, partners in the name of Isaac Wilson & Co. The record death of Isaac Gregg, 14 April, 1814. Judgment confessed thereon by Jeremiah Barker, by writing filed, for $1,561 72, in Allegheny County. No. Testation bond exp. No. 45, Aug. 9, 1815, removed to Beaver County, Jonathan Coulter, sh'ff, levying upon 100 acres on west side of Big Beaver, adjoining the falls Brighton, and also the warrant claim of 700 acres adjoining, sold the same to Jeremiah Barker for $16,500, as property of Wilson, Barker & Gregg, and made a sheriff's deed, dated 5th Sept., 1815.

Also deed of conveyance of Jeremiah Barker to Alfred Ormsley, for 100 acres, within Joseph Williams's warrant, dated 7th Feb., 1817.

Also a deed from same to same, dated 5th Dec'r, 1831, for remainder of 800 acres, reciting "all the right, title, interest, property, and claim of him, the said Jeremiah, of, in, and out of the said article of agreement

14 entered into between the said Daniel Broadhead and David Hoops, and of, in, and to the said two tracts of lands therein mentioned and described to him, his heirs and assigns forever."

Deed of Oliver Ormsley to James Patterson, dated 3d July, 1829, for the same lands and warrant claims ex. of will of Daniel Broadhead, dated 8th Aug., 1809, probated 25 Nov., 1809, in which inter alia of same specific bequests, he "gives and devises all the residue of his estate to and among the children of his daughter Anna Mauray, John Broadhead and Samuel Johnston, executors."

Depositions taken in the action of Elihu Evans, pl'ff, *vs.* David and James Patterson, defendants in Beaver County common pleas, an ejectment for some land offered in evidence, proving the pedigree and heirship of Anne Broadhead as intermarried with Casper Hirna.

Deed of Daniel B. Herna, dated 5th Nov. 1831, for ¼ p'rt George B. Broadhead, dated 10 Nov., 1831, 3-7 of ¼ p't, Daniel W. Broadhead and Eliza, his wife; John H. Broadhead, Wm. F. Broadhead, and wife; Daniel M. Broadhead, guardian of H. R. Broadhead, dated 2d March, 1833, for 4-7 of ¼; and Charles T. Broadhead, dated 25 Nov., 1835, for ¼, all to James Patterson as deduced by mesne conveyance from the heirs of Anne Hirna, daughter of Daniel Broadhead, and married to Casper Hirna, embracing all the interests of the heirs and descendants of said Broadhead.

15 The plaintiff then offered in evidence: Exemplification of record from Beaver common pleas No. 22, April 9, 1831, of William Barker *vs.* Samuel Ross, John Ross, Thomas Ross, John Martin, George McDonald, Jonathan Evans, North Evans, Eli Evans, James Worthington, Wm. Dillon, and William Biles; summons in ejectment, issued 12th March, 1831, for four hundred and forty acres of land (440 a.) or thereabouts, bounded by lands of John Carothers, John Webster, and others, situate in Brighton township, and served as appears in docket entry precipe, but no summons in ejectment is appended to said exemplification. 7th Sept., 1833, on motion of defendants, rule for special jury and new notice to J. Bryan, artist, issued 29th October, 1833. 3d Dec'r, 1833, jury sworn. Tried 6th Dec'r, 1833, verdict for plaintiff for the land contained in the survey, excepting eight acres to be laid off as follows: Beginning at the black oak or factory corner, thence down the creek so far as to include the house, stable, &c.; thence westwardly so far as to include the eight acres by running north to the east and west line of said tract; thence east, along said line, to the place of beginning; these eight acres they find for the def't. 6th Dec'r, 1833, motion for a new trial. Dec'r 5, 1834, motion overruled and judgment on the verdict execution three months. A writ of error went up to the Supreme Court and proceedings returned as affirmed. Fi. fa. issued, No. 40, Nov'r 9, 1837, and habere facias possessionem No. 68, June 9, 1837. The return of the writ is as follows: By virtue of this writ to me directed on the 4th day of June, 1837, I caused

16 the within William Barker to have possession of his time within specified of the tenements within mentioned, with the appurtenances, &c. I have also caused the eight acres to be laid off as within I am commanded, a draft of which is hereto attached. Return of the sheriff, M. T. Kennedy.

As part of the proceedings in the record is an affidavit of James Patterson, 21st August, 1835, setting forth "that he is the person interested in the land for which the above ejectment is brought," &c., &c., seeking a writ of ejectment to be issued against Jonathan Evans, one of the defendants, for waste, &c. Whereupon a writ was duly issued and tested 4th June, 1835, to Samuel Ross and other defendants of record.

Also there appears in the record the following: January 6th, 1842, on motion rules on James Patterson, party in interest, to pay the costs of

special jury at September T., 1833, (copy.) July 20th, 1842, served M. 4. 22 September, 1842, on motion of Mr. Agnew attachment awarded; exit attachment No 22, Nov. T.. 1842.

Also was introduced in evidence the record of a case of James Patterson, a citizen of the State of Ohio, *vs.* Elihu Evans, a citizen of the State of Penn'a, in the circuit court of the United for the western district of Penn'a, being No. 1 of May term, 1855, an ejectment. Summons issued Nov. 25, 1834, for a certain tract of land in Beaver County, State of Pennsylvania, situate in Patterson Township, county of Beaver and State of Pennsylvania, and bounded on the east by Big Beaver Creek, on the north
17 by other lands of the plaintiff, on the west by lands of John Carothers and John B. Webster and other lands of plaintiff, and on the south by lands of John Carothers and the Fallston Water Co.; same tried May 12th, 1857, and verdict for pl'ff. May 20, 1857, motion for a new trial. 21st May, and argued and overruled, and judgment for plaintiff. 1857, June 4, habere facias pos. issued and fi. fa. for costs. Possession delivered under writ to James Patterson, June 5th, 1857.

Also gave in evidence the testimony of William Carothers, taken on former trial, proving that he had become the owner and resided on the Daniel Hill tract, and that the land in controversy was that recovered in the last ejectment and part of that recovered in the first ejectment; and gave in evidence the return of the sheriff the writ of ejectment to show that defendant was in possession.

The plaintiff then rested, claiming that having shown two recoveries for the same land, as shown in the record of the cases of William Barker *vs.* Samuel Ross, John Ross, John Martin, George McDonald, Jonathan Evans, North Evans, Eli Evans, and others, in the court of common pleas of Beaver County, No. 22 of April term, 1831, and of James Patterson, a citizen of the State of Ohio, *vs* Elihu Evans, a citizen of the State of Penn'a, in the circuit court of the United States for the western district of Pennsylvania, No. 1 of May term, 1855, that under the act of assembly of the State of Pennsylvania of the 13th day of April, 1827, he was entitled to recover.

Whereupon the defendant contended that the first having been
18 instituted in the name of William Barker, the warrantee, after he had conveyed all his right and title to the land in controversy to Daniel Broadhead, as appeared from the evidence, there was no privity, and therefore the first verdict and judgment should not be counted against him, and prayed the court so to instruct the jury, which the court after argument of counsel declined, and charged the jury that if the evidence in the case was believed by them the pl'ff had two verdicts and judgments for the land in controversy, which were conclusive in favor of his title and he was entitled to recover.

Whereupon the counsel of the defendant excepted to the charge of the court and asked a note of said exception, and that a bill thereof be sealed and certified, which is hereby done accordingly.

WILSON McCANDLESS, *U. S. District Judge.*

And now, to wit, October 19th, 1864, on motion of Mr. Chamberlain, att'y for def'ts, it is ordered that a writ of error and citation issue in the above cause, to be sent to the Supreme Court of the United States in accordance with the order made and bill of exceptions filed.

By the court. H. SPROUL, *Clerk.*

In pursuance of the above order the following writ of error and citation was issued and served:

19 UNITED STATES OF AMERICA, *ss:*

[SEAL.] The President of the United States to the judges of the circuit court of the United States for the western district of Pennsylvania:

Because in the record and proceedings, as also in the rendition of the judgment of a plea, which in the said court before you between James Patterson, a citizen of the State of Ohio, plaintiff, and Elihu Evans, a citizen of the State of Pennsylvania, defendant, a manifest error hath happened, to the great damage of the said defendant, as by his complaint appears, we, therefore, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein had, that you, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the first Monday of December next, in the Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected the said Supreme may correct that error and do what of right and according to the laws and customs of the United States should be done.

Witness the Honorable James M. Wayne, associate justice of the Supreme Court of the United States, at Pittsburgh, this 27th day of October, A. D. 1864.

H. SPROUL, *Clerk.*

I accept service of the above writ of error.

N. S. FETTERMAN, *Att'y for Pl'ff.*

20 UNITED STATES OF AMERICA,
Western District of Pennsylvania, ss:

[SEAL.] The President of the United States to the marshal of the western district of Pennsylvania, greeting:

Whereas Elihu Evans has this day sued out his writ of error to a certain judgment in a certain action of ejectment recovered against him on the 18th day of November, A. D. 1863, in the circuit court of the United States for the western district of Pennsylvania, in the third circuit, aforesaid, by James Patterson, plaintiff, returnable in the Supreme Court of the United States on the first Monday of December next: These are therefore to command you that you make known to the said James Patterson that he be and appear to said writ of error in the Supreme Court on the first day of the next term thereof, to hear an assignment of errors thereof, and hereof fail not at your peril. And how you shall have executed this writ of citation make return to our clerk of our said court for the western district of Penn'a, at Pittsburgh, on the rule day of the said court for the month of November next.

Witness the Honorable James M. Wayne, associate justice of the Supreme Court of the United States, at Pittsburgh, this 27th day of October, A. D. 64.

H. SPROUL, *Clerk.*

I accept service of the above citation.

N. S. FETTERMAN, *Att'y for Pl'ff.*

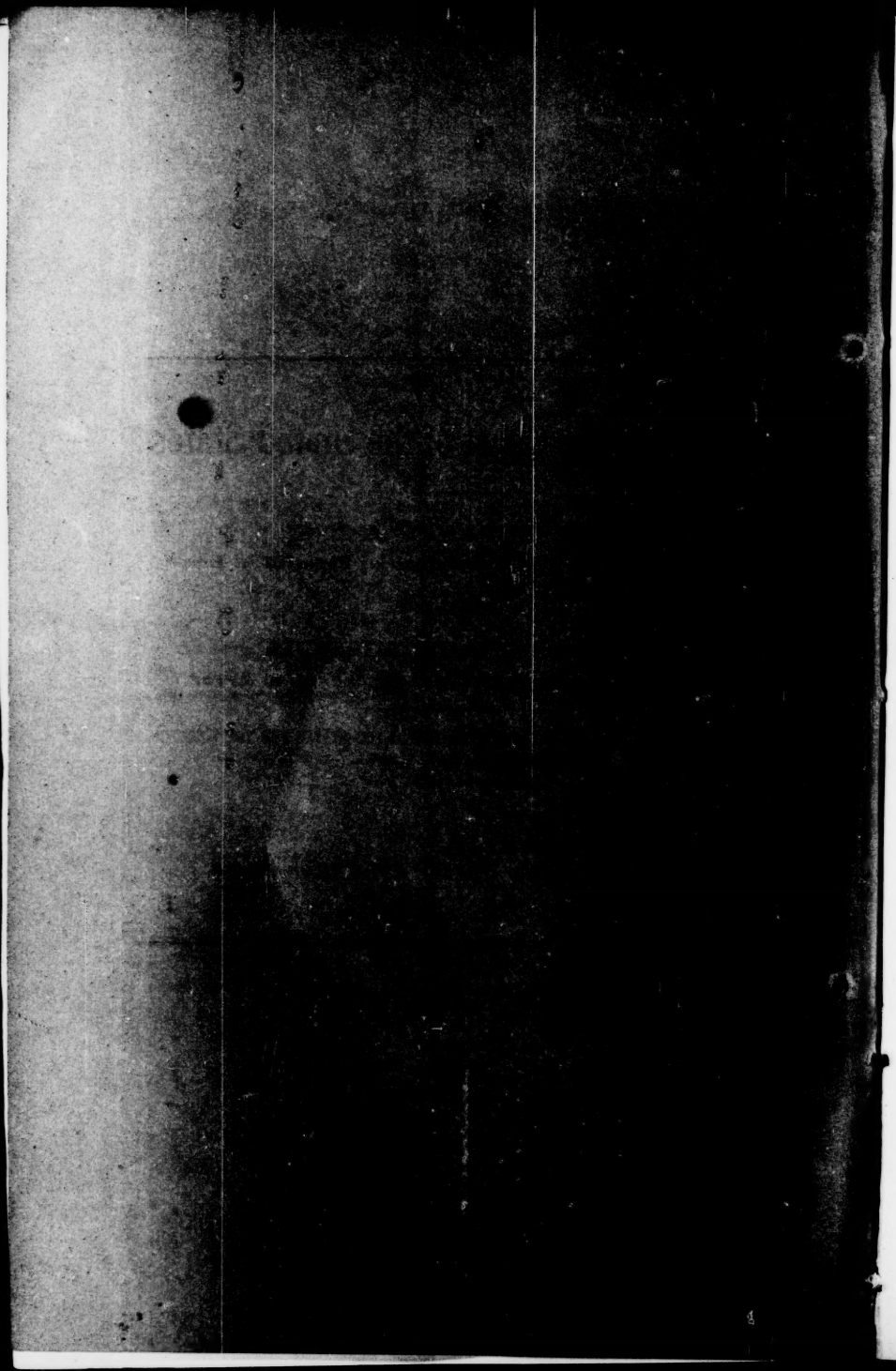
21 UNITED STATES OF AMERICA,
Western District of Penn'a, ss:

I, Henry Sproul, clerk of the circuit court of the United States for the western district of Pennsylvania, do certify that the foregoing is a true exemplification of the record and proceeding in the foregoing case as full and complete as the same remains on file and of record in this office.

In testimony whereof, I have hereunto set my hand and affixed the seal of the said court this 31st day of October, A. D. 1864

[SEAL.] H. SPROUL, *Clerk.*

Filed 1st November, 1864.



Craft 2 Ohio

No. 17

In the Supreme Court of the United States.

ELIHU EVANS

A Citizen of the State of Pennsylvania, Plaintiff in Error,

VERSUS

JAMES PATTERSON,

A Citizen of the State of Ohio, Defendant in Error.

WRIT OF ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF PENNSYLVANIA.

S. A. PURVIANCE,
B. B. CHAMBERLIN,
Attorneys for Elihu Evans, below.

JOHNSTONS, PRINT., PITTSBURGH.

In the Supreme Court of the United States.

ELIHU EVANS,

A Citizen of the State of Pennsylvania, Plaintiff in Error,

VERSUS

JAMES PATTERSON,

A Citizen of the State of Ohio, Defendant in Error.

WRIT OF ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF PENNSYLVANIA.

ASSIGNMENT OF ERROR.

That the Circuit Court of U. S. for the West Dist. of Pennsylvania, erred, in charging the jury, in the trial below, that if the evidence in the case was believed by them, that the Plff. had two verdicts and judgments for the land in controversy, which were conclusive in favor of his title, he was entitled to recover.

ARGUMENT FOR PLAINTIFF IN ERROR.

This Record raises two points for consideration:

1st. Whether the estoppel, under the Ejectment Act of Pennsylvania, arising from two verdicts and judgments between the same parties, or their privies, upon the same title, applies to Elihu Evans, the defendant, in the second ejectment in the Circuit Court of the United States, who was not a party to the first ejectment in the Common Pleas of Beaver County, Pennsylvania, and who was not proved to be privy to the same. In fact, Elihu Evans, the son of Eli Evans, an actual party in the first ejectment, claims by an independent title and Patent to himself, the which, he was, by the U. S. Circuit Court below, precluded, by the interposition of an alleged estoppel, from adducing, and from showing, also, one recovery thereon in ejectment, and possession thereunder.

2d. Whether there was, at the time of the first ejectment, in the name of William Barker, in 1831, any privity between James Patterson, Plaintiff, in the second ejectment, and William Barker, the former Plaintiff, since in the evidence of James Patterson, in the second

ejectment, it was shown that William Barker, the warrantee of the land, had, by deed poll, in 1792, conveyed all his interest in the warrant to Daniel Broadhead, under whom Patterson, plaintiff, claimed title in the second ejectment. It is not, however, intended to controvert the settled doctrine in Pennsylvania, that so long as the relation of *trustee*, and *cestui que trust* subsists between the warrantee and the real owner of the warrant, an ejectment may be maintained in the name of the warrantee, as nominal plaintiff, for the benefit of a real owner of the warrant, but the distinction is taken here that any fiduciary relation between William Barker, warrantee, and Daniel Broadhead, alleged owner of the warrant, had ceased as early as 1792, when the former conveyed his title to the latter, and consequently, no privity between Patterson, claiming under Broadhead, could have existed in 1831.

To these points we will direct our argument.

No 1

The first case was, William Barker, plaintiff, vs. Samuel Ross, John Ross, John Martin, George McDonald, Jonathan Evans, North Evans, *Eli Evans*, James Worthington, William Dillon and William Biles, defendants, in Beaver Common Pleas, No. 22, of April 1831, the Pennsylvania State Court.

No 2

The second case was James Patterson, plaintiff, vs Elihu Evans, defendant, in the Circuit Court of the United States, Western District of Pennsylvania, No. 1, May Term, 1855.

The Act of Assembly of Pennsylvania of the 13th April, 1807, (4 Smith, s. 4, and Purdon's Dig., 277,) provides in ejectment:

"Where the verdict shall, in any writ of ejectment between the same parties, be given in *succession* for the plaintiff or defendant, and Judgment be rendered thereon, no new ejectment shall be brought, but when there may be verdict against verdict, between the same parties, and judgment thereon, a *third* ejectment in such case, and judgment thereon, shall be final and conclusive, and bar the right, and the plea shall be not guilty"

The decisions in the Pennsylvania Courts, on the Statute, have held to the interpretations:

1st. That the ejectment must have been for the same land.

2d. That in the trial the same title should have been passed upon.

3d. That the parties should be the same, or should stand in privity with those who were.

"It is certainly not enough that the former ejectment was upon the same land, on the same title, and under same deed, under which parties at present claim, it is necessary, besides, that the *parties be the same*, or *stand in* privity with those who were."

Timbers vs. Katz, 6 Sarg. & Watts, 310.
Treaster vs. Fleisher, 7 W. & S. 137.

"Privity denotes mutual or *successive* relationship to the same right of property."—1 Greenleaf Evidence, s. 189. Carver vs. Jackson, 4 Peters, 1—83. Blackmore vs Gregg, 10 Watts, 227.

The first ejectment, or No. 1, and judgment on verdict, is not identical in name as to either Plaintiff or defendant with the second ejectment, nor No. 2, for in one, William Barker is plaintiff, and in the other James Patterson is plaintiff. In the first trial the name of Elihu Evans was neither used nor any evidence of privity alleged or adduced. In the second trial no connection or privity was shown, indicating any relationship of Elihu Evans with the title of William Williams' settlement, set up by defendants in Barker vs. Ross and others, but Elihu Evans, on the contrary, set up his own title and patent, under a settlement of one Harvey, excluded, however, from the Court and jury, in the present case of error, in the trial below, by the alleged estoppel.

The only identity or assumed privity, then, of James Patterson and William Barker is that in *both* cases the warrant of William Barker, dated 3d April, 1792, was adduced in evidence, *ex parte* plaintiff below, by which, in one case, No. 1, and *through* which, in the other, No 2, recovery was asserted and had; in the former, in name of William Barker, the warrantee, as implying a legal title, in the latter, Patterson, plaintiff, deducing title from Barker by regular mesne conveyance; and showing, in neither case, any patent whatever from the Commonwealth. The case of Barker (5 Watts, 394, Barker vs. Ross and others,) was then in 1831, predicated upon the presumption of the existence of William Barker, the warrantee, alleged trustee, without the evidence being given as in 1862, (Patterson vs. Evans,) that Barker had conveyed all his title and claim to Broadhead, in 1792.

This brings us to the consideration of the second point.

The general doctrine in Pennsylvania is peculiar to her system of land adjudications, that ejectment at law may be instituted on either equitable or legal titles. That warrants and surveys are to be deemed as against all *but the Commonwealth*, in the same light as a legal estate in the English common law, and the same consequences follow from any conveyance, devise or assignment made by the warrantee or grantee.

Caines vs Grant, 5 Binney, 120.

Maclay vs Work, idem, 158.

The laws of descent equally attend the estate. So as to *settlement* rights, the like relations subsist.

Workman and others vs. Gillespie, 3 Yates, 170.

And a trustee and cestui que trust may either maintain action of ejectment at law. Such has been the doctrine since about the year 1756, when, says Justice Kennedy, "they began to be treated as titles to real estate, o

which ejectment might be sustained, and of which conveyances were within the recording acts."

Shoemaker vs. Huffnagle, 4 W. & S. 443,—Sargeant's land law.

It follows, then, that a conveyance by deed poll of a warrantee, carries with it all legal or equitable rights—they pass to the grantee or assignee—his relation, of legal owner, or trustee, of any beneficial owner, cease. Until transfer under the warrant, he attaches to himself a *constructive* legal seisin of the land, with the same advantages as if in the actual possession at common law, to be defeated by a disseisin in fact, or by some adverse claim or right.—(*Strimpler vs. Roberts*, 6 Harris, 300.) Afterwards his Grantee or Alienee is clothed with the attributes of an owner, and takes the title, subject only to the consequences of his predecessor's acts during his seisin.—(*Blackmore vs. Gregg*, 10 Watts, 225. The Assignee or Alienee can then only maintain suit in his own name.

Applying these principles, the distinctions obviously arising in the case of error, and that of *Barker vs. Ross*, 5 Watts, 394, are appreciable. Chief Justice Gibson says, delivering the opinion:

"The point raised (the non existence of William Barker,) by the 2d assignment of error is disposed of by the decision in *Campbell vs. Galbraith*, 1 Watts, 78, that the *beneficial* owner may maintain ejectment in the name of a nominal warrantee, ignorant both of the action and the trust, no more being required than to disclose the name of the *actual* party."

In the trial below, no mesne conveyances were then shown, whatever, from Barker to Broadhead or to Patterson, no transfer or sale whatever came in evidence. The simple warrant and survey were introduced, Patterson claiming, outside the record, as beneficial owner, without title legal or equitable. He simply files his affidavit, 21 Aug., 1835, that "he was the person interested in the land for which ejectment was brought." It is submitted to this Court, that the principle there announced was inapplicable on the facts recited in the second ejectment. The evidence now discloses the fact that at the impetration of the writ in former case, 12 March, 1831, (William Barker vs. Samuel Ross and others,) the said William Barker as a personal owner in *fact* and not a *nominal* and *fictitious* trustee, had already by deed poll, the 12th April, 1792, conveyed to "David Broadhead and his heirs, executors, administrators and assigns, all the right, title, interest, property, claim and demand, in and to the warrant for land situate on the West Bank of Big Beaver Creek, in the late purchase for 400 acres, dated 3d April, 1792." This was followed up by the Will of General Broadhead, dated 8 Aug. 1809, wherein is embraced in a devise of the residuary portion of his estate (for no mention is made of the specific Barker Warrant,)—the land under Barker warrant and survey, to the children of his daughter Anna, intermarried with Caspar Heiner;

and then in succession deed polls, subsequent to 12 March, 1831, as follows: from heir at law of Anna Heiner, dated, respectively, 10 Nov. 1831—25 March, 1833—25 Nov. 1835—as mesne conveyances of title to James Patterson, the Plaintiff—without the production of any patent from the Commonweath.

The contest originated in 1831, to dispossess those claiming settlement rights under Act of 3d April, 1792, and began without patent, under false colors. The defendant, Elihu Evans, below produced a patent in the second ejectment, in 1857, upon a settlement and title, *independent* of Barker warrant, which mainly turned on questions of contested location and surveys—as against each other.

On these facts thus disclosed, the authority of *Campbell vs. Galbraith*, cited by Ch. J. Gibson, 5 Watts, 794, is not applicable. The rights of a trustee, with a conceded legal status, so long as his relations continue, clothed with the equitable interest of *Cestui que trust* are not controverted. These only were apparently involved in *Campbell vs. Galbraith*, and assumed, without proof and presumed in *Barker vs. Ross*. Our distinction is, on a transfer of legal ownership or title, the trust no longer exists, and no nominal status survives to operate afterwards, upon newly acquired rights, in the way of an estoppel. The authorities are clear in indicating this distinction.

Every warrant granted for land, by the Commonwealth, is presumed to be granted for the use of the warrantee therein named, (*Clugjage vs. Duncan*, 1 S. & R. 117,) and of course he must be presumed in existence until the contrary be proved.—1 Watts, 78. On this general principle, the contrary not being then proved, nor any transfer of warrants shown, *Barker vs. Ross*, followed *Campbell vs. Galbraith*. In neither case were the warrantees on the trials, Josiah Galbraith and William Barker, shown to have existed, or to have claimed any right or interest in the warrants in their respective names. Their non-existence was not presumed; for Justice Kennedy remarks, (1 Watts, 78,) "But proof that the warrant was granted for the use of one or more not named in it, does not rebut the presumption that the warrantee is a real person, and this in full life."

But the whole doctrine is clearly distinguished in *Lawrence vs. Hunter*, 9 Watts, 83. Here the warrant was in the name of Jas. Hunter, dated 14 April, 1792. It was admitted the suit was for the use of Farmers & Mechanics Bank. But the Supreme Court says: "If the land surveyed under the warrant never was legally transferred by the warrantee, and it had been shown in the trial of the cause, that the Pennsylvania Population Company were the equitable owners of the land, by their having taken out the warrant in the name of James Hunter, and paid the purchase money for it to the State, or that they had purchased the land or the warrant from

Hunter, and paid him for it, without having obtained a *legal transfer* thereof, or that they had become the equitable owners of the same in any *other* way, it would have been sufficient to have authorized them or their assignees to have brought the action, as it is in the name of Hunter. But, without making such proof, it is perfectly clear that the defendant below had not only as good, but a better right, to defend himself under the title of the Hunter warrant, than the Bank had to maintain the action upon the strength of it, to recover the land for their use." Further, "the question is then, Was there any such evidence given on the trial?" "I must confess," says Justice Kennedy, "I cannot discover even the least spark of it. *The circumstance of the Company or their agent being in the possession of the Hunter warrant some fifteen years after the survey had been made under it, and then professing to claim the land under it, amounts to nothing towards showing the right to the land. It is, at most, only a declaration of claim, without anything to support it, and therefore goes for nothing when it is required to establish a right.*" This case was reversed for this and other reasons. It entirely limits the previous doctrine of the cases cited, by the qualification

"*If the land surveyed under the warrant never was legally transferred by the warrantee,*" as the first prerequisite whereby recovery in *name* of warrantee can be had. Of the injustice of the case of Barker vs. Ross, Justice Huston, on this very point after remarking (dissenting opinion, 5 Watts, 555,) at the time "but neither had William Barker paid taxes for forty years," adds, on the facts on the trial, ignoring any *privity* of *James Patterson* and commenting upon Campbell vs. Galbraith, "This is also a *mistake;* it was *there* decided that those who carried the warrants to the deputy surveyor, superintended the surveys and *paid the fees*, had a right *use the name* of the warrantee to bring suit. It has not been decided that any man, or every man, can use the name of William Barker to recover and get possession of, and hold this land. It was publicly known who instituted and carried on this, and *no evidence* was given of his right to do so. If he (plaintiff,) can use the name of one who was owner half a century ago, he changes the action—the plaintiff, instead of deducing title, recovers unless the defendant can deduce title from first grantee." This distinguished land lawyer quotes all the various authorities to expose the anomaly of a man using another's *name* to sue, without showing authority or privity. The Pennsylvania Court *below* and the Supreme Court above had no evidence of Barker's title being then divested in law and equity, and now, a judgment thus obtained and interposed as an estoppel, shocks our ordinary notions of elementary law and justice—as 9 Watts 83 cited, shows the doctrine is not favored and is now environed by such salutary limitations as to forbid any recurrence of such an error hereafter. The

doctrine of presumption of conveyance or death, after a silence of Barker for near forty years, precludes a use of his name to carry on a suit. The recent authority of *Warner vs. Henby*, 48 Penn'a. State Reports, 189, (12 Wright,) illustrates the distinctions as to Warrantee or Vendor. So Barker vs. Ross is overthrown by fact and implication. Patterson had never been in possession, nor paid taxes, nor claimed ownership, nor done any act to raise a presumption of right or title in him, to warrant from 1792 to 1831. He did not prove it. The record does not exhibit it.

Can such a verdict and judgment come within the aim and provision of the Act of 1807, by way of estoppel, "to bar the right" of a party in Ejectment? The essential requisite in estoppel, to operate, is that it shall have a reciprocal effect, so that either party should have the benefit of it.—(*Berghaus vs. Altar*, 9 Watts, 382.) "And it would be obviously unjust to conclude him by a judgment in a suit, when he was not a party and could not be heard. So the status and privity must enable either litigant to use the judgment, in evidence against the other, or it is nugatory. Suppose the Record No. 1, had been for defendant against the plaintiff, how could Elihu Evans ever have used that judgment and verdict against James Patterson in the trial below? And in *Work vs. Work*, 2 Harris, 319, the Court observes: "And it is a trite rule of evidence, that a party who would not have been benefited by a judgment had *it been in his favor*, shall not be prejudiced by it as an estoppel, when it is against him." This is the test of the whole matter. On the question of two verdicts, under Act of 1807, in its general construction, the Supreme Court of Pennsylvania, say in *Blackmore vs. Gregg*, 10 Watts, 225–6,—"The bar of *two* verdicts in Ejectment is a statutory estoppel, and estoppels have effect only between parties and *privies*.

Here arose the relations of vender and vendee. "And every vendee takes the title subject to the consequences of his predecessor's acts *during the seisin*, but that it is not to be affected by a verdict against him, or by any act done by *him afterwards*. The rule, perhaps, is universal, that he who stands not in privity, and has neither day in Court, nor *right to be made a party*, is not to be prejudiced by the judgment, and it will not be disputed that he who could not be prejudiced by it shall not have advantage from it."

"A vendee stands in privity to his vendor, only in respect to acts done before the title was conveyed." A judgment is conclusive only of those things directly adjudicated."

These then are the principles of authority in the Pennsylvania tribunals, that are to rule this case, on the Bill of Exceptions, under the assignment of error.

Applying the facts on the records claimed as an estoppel, and the proofs of the defendant in error, on the late trial below, the parties do not appear in *name* as the *same* parties. Under the act of 1807, the matter of *equitable* estoppel between privies, only arises then from judicial construction. The words "privies," or "privity," are not within the language of the act. They spring up only by implication. Privity must be shown then *in pais dehors* the record, and be conclusively made out in the evidence of the defendant in error, before claiming it in bar of recovery. The *onus probandi* is upon James Patterson, plaintiff below. How then does he stand. The plaintiff, in his own case, utterly disproves any legal privity. Elihu Evans, plaintiff in error, was no party to the record of Barker vs Ross. He was not then in possession of the land. He did not appear in any way as a litigant in the contest. He had no day in Court. He could not have appeared. *His* title and possession subsequently, was by an independent claim and patent from the Commonwealth. He was not, in fact, connected in title or privity with defendants. He was not in hostility to Barker's title, but stood *outside* of it, as he claimed by other settlement, and survey, and in the second record only was his title at all passed upon. It being now shown in this case of error, on evidence of plaintiff below, interposing Barker and Ross, case No. 1, in bar, that Barker was not a man of straw, but a person of flesh and blood, not a naked trustee even, but a real owner, who had divested himself of all claim or title, legal or equitable, in 1792, is not the judgment obtained in 1831, then, a fraud and deception in law, and in any judicatory, for want of jurisdiction and validity, to be disregarded and disowned? The party being dead *presumptively*, can any right be asserted in law against a dead man, and can departed rights, slumbering for most half a century, be snatched from the grave, be fictitiously set up, and, *nominally*, adjudicated in a legal forum, and then, after thirty years again, stalk forth as ghostly estoppels to the adverse possessions and claims of the *living?*

Is it any where held or claimed that after the death of a party, or the divestiture of all rights, his name may become a dry stock on which to ingraft anything vital to bear fruit to another? And these claiming in name of an original donor, or assignor of title, and not in their own names can they derive any benefit of such an alleged and spurious estoppel?

The argument, so far, has proceeded upon the effect claimed for the judgment record of Barker vs. Ross, in the bill of exceptions, as found in the ruling charge of the Circuit Court below to the jury:

"That if the evidence in the case can be believed by them, the Plaintiff had two verdicts and judgments for the land in controversy, which were conclusive in favor of his title, and he was entitled to recover."

This was in direct application of the two records. That a judgment record

in ejectment, between the same parties, or privies, as to the same land, might go in evidence for other purposes than estoppel, as a fact to break the continuity of possession of same land, under a defence of the Statute of Limitations, might be conceded in argument, yet would not avail the defendant in error in this case.

And as a persuasive evidence in weighing title, even a judgment of non-suit has been allowed on the trial of ejectment. They are exceptional.—But in estoppel, every element is requisite, under the Penn. Act of 1807, to be shewn, to exclude a defendant from going before a jury with his own title. As a general principle it may be contended, the record of Barker vs. Ross implies verity in itself. Giving the full implication of the judgment, it proves not enough, or proves too much, as against Elihu Evans, plaintiff in error, and defendant below. His *name* in not on the record. His privity in title, and possession, could only be shown by evidence *in pais*, and no evidence was shown by Patterson, plaintiff below. The only evidence to the jury was the record. The relation of Elihu Evans to any one of the defendants, served with process, is wanting. The onus was upon the plaintiff. The Court's instruction was a binding one on the evidence in the case, and was assumed to be conclusive, and the defendant cut short of the opportunity to introduce his own independent title, or any defence whatever,. That a party, claiming title, cannot be estopped by any judicial proceedings in a case, *acta inter alios*, he having no day in Court, or notice to appear, is settled in all Courts.

In an *ejectment* against a terre tenant of Mortgaged premises, by the purchaser at Sheriff sale, the defendant may avail himself of any defence which he might have made, as if he had been a party to the *Scire Facias* suit. But if he had been served, with *notice* of the suit upon the Mortgage, the *judgment would have been conclusive upon him and his title.*

Mather vs. Clark, 1 Watts, 491.

The terre tenant is not concluded by a judgment awarding execution thereon, unless it appear he had notice of the suit, or it was served upon him in due time, &c. He will be permitted to make the same defence in the trial of the ejectment brought against him by the purchaser of the land at Sheriff's sale, that he might have set up in the *Scire Facias.*

Koons vs. Hartman, 7 Watts. 23.

The same doctrine laid down, Cowan vs. Getty, 5 Watts, 535.

The alienee of a mortgagor, or of a judgment lien debtor, must have notice as terre tenant, in interest, or in ejectment, he is not precluded from every defence he could originally have made. In other words he is not estopped.

This decides the principle of estoppel, *strictissimi juris.* And especially so in a statutory estoppel in derogation of common law rights. These are authoritative expositions. We are looking to the record, and its simple

legal implications. The defendant below has but once, on a full hearing of his own title, as against his adversary's, had any favorable determination of a Court and jury, followed by a judgment. Again, the Court will find, in looking over the record, No. 2, Patterson vs Evans, in U. S. Circuit Court, No 1, May Term, 1855, the case occupied eight days on the trial. The defendant let in to his own legal defence on trial below, would have shown two verdicts in his favor, and a judgment, in the State Court of Beaver C. P., against James Patterson and David Coup, No. 31, Sept. T., 1837, being judgment vs. judgment, on full hearing in the respective Courts, where ejectments were tried. These were facts, from showing which, defendant below was excluded by error below.

The Pennsylvania statute of April 13th, 1807, as to the bar of two successive verdicts and judgments in Ejectment between same parties, has been presented on principles deemed established by judicial interpretations of the Pennsylvania State judiciary. The case of *Jackson vs. Chew*, 12 Wheaton, in U. S. Sup. Court, 153, lays down the doctrine:

"This Court adopts the State decisions, because they settle the law applicable to the case, and the reasons assigned for this course, apply as well to rules of construction, growing out of the common law, or the statute law of the State, when applied to *lands*. The case of *Gardner vs. Collins*, 2 Peters, 85, is emphatic in re-affirming "when the question upon the construction of the statute of a State relative to real property, has been settled by any judicial decision of the State in which the land lies, this Court, upon the uniform principles adopted by it, would recognize that decision as part of the local law." What in Pennsylvania constitutes estoppel, is clearly shown as conformable to general principles at common law, and cannot arise on statutary enactments, without carrying with it all the well considered limitations upon facts proved, on which to predicate legal conclusions. The defendant in error, the plaintiff below, stands before the Court without proof of record or *aliunde*, to entitle him to an affirmation of the judgment below. What the parties might have shown on a full investigation of their respective titles, as compared with each other, does not appear on the record. The absence of necessary evidence, can alone be ascribable to the plaintiff below, in as much as he assumed the affirmative of his issue, and chose to rest his case upon an alleged state of facts, unwarranted and unsustained by evidence,—the defendant below submitting, from necessity, to erroneous legal conclusions, from the Court, for the correction of which and for the reversal of the Judgment, the plaintiff is constrained to appeal to a higher appellate tribunal. Without oral argument, he submits his case to the judicial scrutiny and candid judgment of this Court.

ELIHU EVANS,
In propria persona, Plaintiff in Error.

IN THE

Supreme Court of the United States.

ELIHU EVANS,

A CITIZEN OF THE STATE OF PENNSYLVANIA,

Plaintiff in Error

VERSUS

JAMES PATTERSON,

A CITIZEN OF THE STATE OF OHIO,

Defendant in Error.

REPLY OF PLAINTIFF IN ERROR.

The answer to the argument of plaintiff in error is not to the point of the case. The objection below was as to the conclusiveness of the record of Wm. Barker, *vs.* Ross, *et al.* in the Court of Common Pleas of Beaver County, as an *estoppel*. The one reason of objection, the divestiture of all title, legal and equitable, in 1792, was one of many on its very face. It was no part of the defendant's duty below to give evidence *in part*, to show the relation, by succession or otherwise, of Eli Evans, or of Elihu Evans. The plaintiff below chose to rest upon the record alone, and the evidence previously adduced, claiming an *estoppel*, neither shown on its face nor explained by extrinsic evidence *aliunde*. Elihu Evans is not a nominal party on the record, nor proved otherwise to be in privity of blood or at all interested in defending original suit.

It is further replied, that the objection below was necessarily to the whole record, as not within the words or implications of the Act of 1807. The authorities cited by the defendant in error, are of *statutory estoppels*, but of the incidents of trial in evidence.

Aside from the restrictive Act of 1807, ejectments at common law might have been indefinitely multiplied by suitors as against each other, without deciding the right, until arrested in equity by a Bill of Peace, a familiar principle. But two successive verdicts and judgments under the Act of 1807, or two of three verdicts and judgments, on the same title and between the same parties, conclude the litigants. The trial may be arrested at any stage when a matter of law submitted to the court, such verdicts and judgments are on their face and on the evidence conclusive. At this point, when proved, the mouth of the adversary is shut; he is estopped from going further in the case as matter of law. Whatever of title he has to the truth thereof, he is prevented from proving. So in the case below, the court assumed to charge the jury, if they believed the evidence, there were two verdicts and judgments. Evans was shut out from going into his case. The evidence was in the *ex-parte* proof of the plaintiff below. The records were held *estoppels* in law, sufficient to maintain the case of the plaintiff and enable him to recover and exclude the defendant from further remedy other than to except to the ruling of the court. The very object was to shorten the trial, cut off defendant and close the case for plaintiff. Both parties so understood it.

It is said Eli Evans died before the institution of the second ejectment against his son Elihu Evans. Well, be it so, it raises no implication that he held the property under the father as heir at law. The facts admitted in evidence would have shown the son claiming, not under the warrant of William Barker, but of an independent title, as outside in location of Barker warrant. But plaintiff gave no evidence, the fact is not on the record; and defendant below was excluded from showing his title.

The question of carrying on an ejectment in the name of a former owner, after divestiture of his legal interest by conveyance, is fully considered in the main argument of plaintiff in error, pages 4, 5, 6 and 7. The points are not deemed answered. The distinction taken in 9 Watts, 83, as showing the errors in 5 Watts, is not controverted. The law of 5 Watts is not the law settled in 9 Watts, 83, as distinguished upon the particular facts.

And the interlocutory order "*on James Patterson, party and interest, to pay the costs of a special jury,*" is immaterial and cannot affect Elihu Evans, neither as party, nor recipient of any costs. The record shows he had not appeared; so Elihu Evans, Plaintiff in error, stands intact by the order in question.

The point is, had William Barker any legal or equitable title in 1831, when his name was used? The fact is not questioned. He had none. If James Patterson had no right, title or claim, to the land in 1829, through Broadhead, then, in name of Broadhead's heirs, he should have instituted suit. The authority of 12 Wright, 189, shows how he should have recovered, if at all—not by using a name of a man whose title was already conveyed away and presumptively dead. It is said Broadhead claimed to be owner of Barker's warrant. So he did, for he had a regular conveyance of it, a legal title, in 1792. The Hoop's contract of 1801, never embraced any portion of the land in controversy, by any possession whatever. It was claimed by settlers who were in hostile possession. Patterson had no patent, no legal title, no possession of any portion, until he, in 1831, used Barker's name; not his own nor his own vendors' title to recover. He succeeded in violation of the law as held in 12 Wright, 189, 190, which recites the acts necessary, "to raise a presumption that the warrantee was a *trustee*, or that there had been a conveyance, which was lost." Thus in every way this judgment of Barker *vs.* Ross, 5 Watts, asserted to be an estoppel, is assailable and indefensible. The question of the controversy extending over half a century, cannot be an argument for excluding one party from showing title and allowing the other to recover on ex-parte testimony. Why did plaintiff below

institute his action after such lapse of time? From 1792 to 1831 we hear neither of Barker nor Broadhead instituting action to dispossess the settler, a period of 40 years, and it was reserved to plaintiff below to begin the controversy 30 years ago, and persist in it after 70 *years had gone round.*

It is submitted that the plaintiff in error stands in no unfavorable contrast with the defendant in error, in seeking to vindicate his own peaceable possession, by comparing his own title with that of his adversary. Equality of privilege he alone asks. He submits the errors are substantial, and calls for a reversal of the judgment.

ELIHU EVANS,
Plaintiff in Error, in propria persona.

IN THE

Supreme Court of the United States,

ELIHU EVANS,

A CITIZEN OF THE STATE OF PENNSYLVANIA,

PLAINTIFF IN ERROR,

VERSUS

JAMES PATTERSON,

A CITIZEN OF THE STATE OF OHIO,

DEFENDANT IN ERROR.

ARGUMENT OF DEFENDANT IN ERROR.

James Patterson, pro. per

J. M'Millin, Steam Printer, N. E. cor. Wood & Third Sts. Pittsburgh.

IN THE

Supreme Court of the United States.

ELIHU EVANS,

A Citizen of the State of Pennsylvania, Plaintiff in Error.

VERSUS

JAMES PATTERSON,

A Citizen of the State of Ohio, Defendant in Error.

ARGUMENT FOR DEFENDANT IN ERROR.

By the Act of Assembly of Pennsylvania, of the 13th of April, 1807, "where two verdicts shall, in any suit of ejectment between the same parties, be given in succession, for the plaintiff or defendant, and judgment be rendered thereon, no new ejectment shall be brought; but where there may be verdict against verdict, between the same parties, and judgment thereon, a third ejectment in such case, and verdict and judgment thereon, shall be final and conclusive, and bar the right, and the plea in ejectment shall be not guilty."

The Act extends to assigns, Drexel vs. Mann, 2 Barr, 267, and all others who stand in privity. Blackmore vs. Gregg, 10 Watts, 224.

Upon the trial of this case, the plaintiff in error, who was defendant below, offered no evidence; and the only question raised by him on the trial, was, whether the verdict and judgment in the ejectment of Wm. Barker vs. Ross *et al.*, in the

Court of Common Pleas of Beaver County, for the land in controversy, was to be counted as one recovery. He contended, "that as then appeared from the evidence, that ejectment was instituted in the name of William Barker, the warrantee, after he had convcyed all his right and title to the land in controversy to Daniel Broadhead, and there was no privity; therefore, it should not be counted against him, and prayed the court so to instruct the jury, which the court declined, and charged them, that if the evidence in the case was believed by them, the plaintiff had two verdicts and two judgments for the land in controversy, which were conclusive in favor of his title, and he was entitled to recover."

As then, the only objection to the recovery in Barker vs. Ross *et al.*, was that Barker had parted with his title before the action was instituted, by that objection, the plaintiff in error must stand or fall.

There was no objection made, nor exception taken on the trial, as is now sought to be done, that Eli Evans and Elihu Evans were not the same person, or of want of privity as to them, and it is submitted, that even if there was anything in the objection, it is now too late to raise it.

"The Supreme Court, upon a writ of error, will inquire only into the merits of those points raised by the record." Drexel vs. Mann, 6 W. & S., 343; so on a bill of exceptions to the admission of a paper, for want of proof of authenticity, a court of error will permit no objection to be made which was not urged below." Berks vs. Myers, 6 S. and R., 12.

"Where a deed of assignment was received in the court below, without objection, it was held that it could not be objected in the court of error, that it was not recorded within thirty days from the date, as required by the Act of 24th March, 1818." Wilmarth vs. Mountford, S S. & R., 124.

"A party will be held to the ground of objection taken by him to evidence below." Milliken vs. Barr, 7 Barr, 23.

"On a writ of error, variances between instruments of writing produced in evidence, and the description of them in the declaration, cannot be urged in reversal of the judgment, unless specifically pointed out on the trial." Watson vs. Laren, 19 Wend., 557.

"Where no objection was taken at the trial to the absence of evidence, which it might have been in the power of the party to supply, it is too late, after verdict, to take it." Catlin vs. Insurance Co., 1 Sumner, 434; so, "If an objection is made and overruled, as to the admission of evidence, and the party does not take an exception at the trial, he is understood to waive it." Porter vs. Fleger, 11 Peters, 211.

"The Supreme Court will not reverse a judgment because of an omission, on the trial, to instruct the jury on a material point in the cause, if the attention of the court below was not directed to it by the parties." Newman *et al.* vs. Edwards, 10 Casey. 32; Rouck vs. Miller, 12 Harris, 277.

Eli Evans, a defendant in the first ejectment, died before the institution of the second ejectment against his son, Elihu Evans, the present plaintiff in error, who, upon the trial of the present case, the third ejectment, by the return of service of the writ upon him by the Sheriff, was proved to be again in possession of the land in controversy. But how he was in possession, whether by inheritance from his father, or otherwise, does not appear upon the record; and it is denied that his title or claim was distinct from and independent of that of his father. Nor does the record show what title, if any, he set up in the second ejectment. In the present, he neither set up, nor offered to set up any; consequently, in the absence of any evidence of an offer, or attempted offer, to prove that he was in possession by a title different from that of his father, the presumption of law is that he was in by title derived from him. "Every intendment will be made by a court of error in favor of a jndgment." McCaskey vs. Graff, 11 Har. 321.

The strictness in proof contended for by plaintiff in error, is only required when, upon the trial, the opposite party insists upon it, or objects to the want of it; but that it may be waived, is fully established by the foregoing authorities, and many others that might be cited; and, therefore, all the cases upon the doctrine of estoppel, cited by the plaintiff in error, are inapplicable.

The only question raised by the record, and to be considered in this case, is, whether the recovery in the ejectment in the name of William Barker, was one that could be

counted If it could, there were two recoveries, which were conclusive as to the title. To that recovery, as mentioned, but one objection was made, viz: that before the suit was instituted, Barker had conveyed his title to Daniel Broadhead. By reference to the record, pages 5 and 6, it will be seen that Broadhead claimed to be the owner of the Barker warrant, and by his agreement in 1801, contracted to sell the land it called for, to David Hoops, whose equitable title was, by divers conveyances, vested in Oliver Ormsby, and by him conveyed on the 3d Jnly, 1829, to James Patterson, the defendant in error, and that the legal title was vested in Patterson, by conveyances from Broadhead's heirs, of various dates, the last on the 25th November, 1835.

The ejectment of Barker vs. Ross *et al.*, which will be found reported in 5 Watts, was instituted on the 12th March, 1831, at the instance of Patterson, who then held the equitable title, and was for the 400 acres called for in the warrant, the land in controversy being part. At that time, no deed from Barker to Broadhead could be found, and the owners of the equitable title supposed that none had ever existed; but it was found before the institution of the second ejectment, in 1855, in the Circuit Court of the U. S., in which Patterson was plaintiff, and Elihu Evans was defendant.

"Under the laws and customs of Pennsylvania, one might take out any number of warrants for land in different names." Heidekoper vs. Burns, 1 Wash. C. C. R., 109; and to establish his ownership of a warrant, it was only necessary for him to prove that the warrant had been issued at his instance; or that he had paid for it; or had superintended the survey; or paid the surveying fees, &c." Campbell vs. Galbreath, 1 Watts, 70; Wolf vs. Goddard, 9 Watts, 171; Turner vs. Watterson, 4 W. & S., 547; and Cluggage vs. Duncan, 1 S. & R., 117; and that ejectment might be maintained in the name of the warrantee. Campbell vs. Galbreath, 1 Watts, 78; Ross vs. Barker, 5 Watts, 394; and Lawrence vs. Hunter, 9 Watts, 83.

In the case of Barker vs. Ross *et al.*, the defendants obtained a rule "*on James Patterson, party in interest, to pay the costs of a special jury,*" and enforced their payment by an attachment, (pages 6 and 7 of record.) Thereby not only admitting, but

alleging, his equitable ownership of the warrant, and that the suit had been instituted and conducted for his use.

Wm. Barker was merely a nominal party. James Patterson, who was answerable for the costs, and the only person to be benefitted by the recovery, was the real party. The Act of Assembly making two verdicts between the same parties conclusive of title, has, by authorities cited, been extended to assignees, and also privies in blood; and will not the same construction that looks to the substance, and not to the shadow, also include the *real* plaintiff, who is responsible for costs, and benefitted or injured by the result?

In Craft vs. Lathrop, 2 Wal. Jr., C. C. R., 103, a party was enjoined from proceeding with an ejectment where there had been two verdicts and judgments, although the title and the parties in the first and second ejectments were not formally the same.

In Peterson vs. Lathrop, 10 Casey, 223, and the authorities therein cited by the court, it is held that "It is only between the same parties, or their privies, that the judgment of a court of concurrent jurisdiction is conclusive; but those are held to be parties who have a right to control the proceedings." "That the courts look beyond the nominal party, and treat as the real party him whose interests are involved in the issue, and who conducts or controls the action or defence, and hold him concluded by any judgment that may be rendered."

"In an action of ejectment, npon the trial of which the defendant gave no evidence, but relied upon the insufficiency of the plaintiff's evidence in support of his title, it is not error in the court to instruct the jury that it is sufficient to entitle the plaintiff to recover." Foust vs. Ross, 1 W. & S., 501.

The title set up in the first case, by Patterson, the *real* plaintiff, was a warrant in the name of William Barker, dated 3d April, 1792, for 400 acres, and a survey thereon, dated 4th April, 1794, duly returned to the land office.

In the second case, title by the same warrant, survey and return, were set up by him; and in both cases its validity was vindicated by verdict and judgment; and in the present case, it was set up by him with like result. In each case, the title passed upon was the same, and in each case the land in controversy was found to be within the Barker warrant and survey.

This controversy has lasted over half a century. Defendant in error's attorneys in the case of Barker vs. Ross *et al.* are all dead; witnesses are dead; papers lost, and marks upon the ground obliterated; and it is respectfully hoped that, after three verdicts and judgments in the same way, between substantially the same parties, on the same title, and for the same land, the controversy will not, by reason of any exception without substance, and without merit, be again thrown open.

JAMES PATTERSON,
In propria persona, Defendant in Error.